"ALL CITIZENS ARE EQUAL BEFORE LAW AND ARE ENTITLED TO EQUAL PROTECTION OF LAW"-ARTICLE 27 OF THE CONSTITUTION OF THE PEOPLE'S REPUBLIC OF BANGLADESH ● dslawdesk@yahoo.co.uk

HUMAN RIGHTS ANALYSIS

Determining the extent of right to safe environment

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From the perspective of judicial enforcement, environmental rights can be divided into two kinds - substantive and procedural. A substantive environmental right implies having a stand-alone right to quality environment whereas, procedural environmental right accommodates three pillars within its tenor - access to information, participation in decision making and access to environmental justice.

In Bangladesh Constitution, neither of the abovementioned two kinds of rights make their appearance. There has only been an insertion of a provision (Article 18A) concerning environment in 2011 which enunciates that the State shall endeavour to protect and improve the environment. In absence of a substantive provision on a fundamental right to safe environment, the approach preferred by States like Bangladesh has been the 'greening' of other human rights. This approach suggests reading the right to safe environment into one or more recognised human rights. In other words, it implies broadening the horizon of rights (such as right to life) to accommodate right to environment within that broadened horizon. The countries that can be considered as such 'painters' who in fact played the most instrumental role in 'greening' human rights are Bangladesh, Pakistan and India.

For Bangladesh, the landmark decision of *Dr. M. Farooque* v *Bangladesh* read the right to a healthy environment into right to life enshrined in Articles 31 and 32 of the Constitution. This case challenged the validity of some flood action programmes taken up by the government in 1995. It was *Farooque*'s case that let the content of right to life travel beyond its hitherto established sphere. In the post-*Farooque* era, applicants have gone on to obtain favourable rulings in petitions concerning vehicular and industrial pollution, unlawful construction of brick fields, commercial shrimp cultivation, gas explosion, river encroachments and many others.

For India, the constitutional design in terms of environment is a bit expansive, if compared to that of Bangladesh. Alongside enjoining the State to endeavour to protect improve environment like ours, the Constitution casts a duty on every citizen to help in the preservation of natural environment (Articles 48A and 51A respectively). However, absence of a substantive right to safe environment is a reality for Indian Constitution as well. Hence, the 'greening' of human rights was the preferred approach for India too.

In the early 1990s, the Supreme Court of India found 'the right to enjoyment of pollution-free water and air for full enjoyment of life' as coming within the purview of the constitutionally guaranteed right to life (*Kumar* v *State of Bihar*). Starting from *Kumar*, the Supreme Court of India later discovered certain other beads in the thread. In 1995, alongside freedom from pollution of air and water, 'the protection and preservation of the environment, ecological balance, and sanitation, without which life cannot be enjoyed' were also read into right to life. The discussion would remain incomplete, if reference is not made to *M.C. Mehta* v *Union of India* (2002) which came out to be one of the most famous decisions due to the mandamus orders issued by the Court to oversee the State's compliance with the court's directions.

This approach is also preferred by the European Court of Human Rights (hereinafter, ECtHR). This too can be explained with the fact that the European Convention on Human Rights does not have a specific provision on a substantive right to environment. An additional protocol to the Convention on Human Rights concerning the right to a healthy environment was recommended; however the need for a substantive stand-alone right to environment was persistently downplayed by the Committee of Ministers. And therefore, greening of human rights is what ECtHR has nurtured.

In the *Budayeva and Others* v *Russia* (2008) case, the Court gave a glimpse of handling incidences of climate change impacts, such as floods and mudslides. The case involved several deaths and injuries caused by a mudslide, attributable to Russia's failure to repair a dam. Upon recognising the severity of the incident and the applicability of the provision of right to life appearing in Article 2 to 'any activity, whether public or not', the Court's focus was on an expansive reading of the right to life. However, the greening of right to life as undertaken by ECtHR in *Budayeva* is too cautious of an approach if compared to that adopted in the subcontinent. The unanimous opinion by the Court to the effect that there was 'violation of Article 2 because there were injuries and deaths resulting from the alleged environmental manmade hazard' is problematic in a sense that unlike sub-continent, the Budayeva approach did not read right to environment as an integral part of right to live with dignity as such.

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It is not only the greening of right to life that we can find in ECtHR's approach rather it has also been the greening of right to privacy. In *Di Sarno* v *Italy* (2012), the Court went on to recognise a right of the persons concerned to respect for their private life and their home and, more generally, to enjoy a healthy and protected environment to come within the purview of Article 8 of the European Convention of Human Rights.

There is very little in the European Court's jurisprudence on broader issues as biodiversity, the environmental notion of inter-generational equity or precautionary principle. The African and Inter-American jurisprudence appear to be far richer in terms of environment than that produced by the European Court. Article 24 of the African Charter, on the right of all peoples speaks categorically of right to 'a general satisfactory environment favourable to their development.' This Article alone suffices to explain the approach of the Commission in helping peoples realise their right to environment as a substantive one.

In 1994, Ms. Ksentini, Special Rapporteur on Human Rights and the Environment for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, urged the adoption of a human right to a satisfactory environment, meaning a substantive right to environment. Human Rights Council seems to have moved after almost two decades by that urge. In March 2012 the Human Rights Council decided to establish a mandate on human rights and the environment, to study (amongst others) 'the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policymaking'. A textual interpretation of the mandate as well as the latest resolutions adopted by Human Rights Council on Human Rights and Environment gives the impression that the Council still does not recognise a substantive human right to environment.

Judicial enforcement of environmental rights is tainted with numerous challenges and more often than not faces scholarly criticisms. The notion of 'environment' with its associated lack of certainty and an inherent indeterminacy in terms of the contents, adds more layer to those criticisms. And as a cherry on top, comes the absence of a substantive right in the Constitution or the respective human rights instruments. The road to having a substantive right to environment seems coarse and rough; anything but easy. However, optimistic scholars like Karen Hulme expects that a substantive right to environment may sneak up through the surface as a bi-product of the greening approach. Hulme sees greening approach as 'a transitional stage of environmental rights jurisprudence.

THE WRITER WORKS WITH LAW DESK, THE DAILY STAR.

LAW EXCERPTS

AN OVERVIEW OF ENVIRONMENTAL LAWS OF BANGLADESH

TAHSEEN LUBABA

With the imminent threat of climate change on one hand and the everyday cost of deteriorating habitability on the other, Bangladesh is one of the most environmentally vulnerable States. The combatting of the pressing needs of the environment cannot be met without an effective legal framework and its proper implementation. Therefore, on the occasion of World Environment Day, this article briefly outlines some of the major legislation which address environmental concerns.

The Environment Conservation Act 1995

This Act is the basis upon which the Department of Environment is formed, the Director General (DG) is appointed, Environment Impact Assessment is carried out and Ecologically Critical Areas are determined. The Environment Conservation Rules are laid out under the Act, outlining the standards of the air, water and other components of the environment. The Act has faced criticisms for allotting extremely wide powers to the DG, leaving, not laying out the necessary technical qualifications of concerned officials, inadequate sentencing and for leaving the loopholes of "national interest" and "good faith".

The Environment Court Act 2010

The Act aims to create a speedy disposal of cases relating to environmental harm. However, the effectiveness of the courts are hindered as people cannot directly approach the court; instead the investigator appointed by the DG of the Department of Environment must file a report upon which cognizance can be taken. The aim of the Act to establish an environment court in each district has remained largely unfulfilled. That, and the failure to ensure that the officials of the environment court are sufficiently edified on the requisite knowledge have been roadblocks in the path to environmental justice.

The Forest Act 1927

The Act was originally promulgated with the objective of regulating the transit of forest produce and the taxes on such. Yet, it does contain protective measures which can be implemented for the conservation of forest resources. It lays down activities which are prohibited in reserved forests and penalises violations of the provisions. The Act also envisions the creation of village forests, which would be an effective way to ensure people's participation and community rights. Unfortunately, this provision has not really been practiced.

The Wildlife (Conservation and Security) Act 2012

This more recent law was passed with a view to conserving the biodiversity, wildlife and forests of the country. The Act allows for the declaration of sanctuaries, national parks and community conservation areas and lays down the permissible activities within such premises. An impressive aspect of the Act is that it recognises

national heritage, memorial trees or sacred trees while respecting the traditional or cultural values and norms of the communities. This is a big step towards the recognition of the rights of indigenous communities.

The Brick Manufacturing and Brick Kilns Establishment (Control) Act 2013

With a view to the regulating the brick manufacturing process this Act was passed in 2013. The Act places multiple restrictions regarding the areas near which brick kilns can be established- these have been criticised as being too ambitious and to an extent, unfeasible. The Act also outlines the prohibitions regarding the use of raw materials from sources such as agricultural land, hill or hillock and the use of wood as fuel. Sadly, the reality reflects almost no compliance with these provisions.

The Bangladesh Biodiversity Act 2017

The Act was passed in line with Bangladesh's constitutional mandate under Article 18A and international mandates under Convention on Biodiversity. The Act regulates who may have access to biological resources and traditional knowledge and how such resources and knowledge may be lawfully transferred. It delegates the duties for granting permission to such access on the National Biodiversity Committee, who shall also determine the equitable sharing of benefits accrued from biodiversity, biological resources and traditional knowledge.

Apart from these Acts, there are many other laws which indirectly address environmental concerns. For example, the Consumer Rights Protection Act of 2009, The Animal Welfare Bill- all of these contain provisions which have environmental impacts. Urban planning has been addressed in the Playgrounds, Open Spaces, Parks and Natural Reservoirs and Preservation Act 2000 and air pollution is specifically targeted in the Clean Air Bill. For the protection and conservation of water resources, The Bangladesh Water Act 2013 was also enacted.

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COURT CORRIDOR

Landmark environmental law verdicts

ALI MASHRAF

While our higher judiciary has no original jurisdiction on environment matters, its writ jurisdiction has been frequently invoked in the last few decades for protecting and preserving our environment. On the occasion of 5th June, the World Environment Day, let us revisit some notable decisions of our apex judiciary on environment matters.

HCD declares rivers as 'legal persons'

Following a report in The Daily Star titled – 'Time to declare Turag dead', Human Rights and Peace for Bangladesh filed a writ petition on the legality of earth filling, encroachment and development of structures along the banks of Turag river. Thereafter, the HCD accorded legal entity to Turag along with all the other rivers of Bangladesh, in a bid to save our rivers from being polluted and encroached upon.

Liberalising the concept of 'locus standi'

In *Dr. Mohiuddin Farooque* v *Bangladesh* (1995), our judiciary paved the way for public interest litigation by liberally interpreting the terms "person aggrieved" as anyone who, despite not being personally affected, has sufficient interest in the subject matter. The petition was filed challenging the legality of the experimental project of the Flood Action Plan (FAP) in Tangail. Following the court verdict, the government reformed the project, doing away with the initial scheme, and also introduced environmental impact assessment plan consulting the local people.

First instance of judicial recognition for environment protection

Before the insertion of Article 18A via the 15th Amendment, there was no constitutional provision for the protection of the environment. Thus, *Dr. Mohiuddin Farooque* v *Bangladesh* (1996) became the first instance of the judicial recognition of the protection of the environment. The petition was filed challenging the nuisance and sound population during the campaign for the 1996 general elections. The court ordered the Attorney General to take necessary steps for preventing damages to public and private property in the guise of election campaigning.

HCD orders phasing out of two stroke motor vehicles

Owing to the environmental hazards caused by two stroke three wheelers in Dhaka via smoke emissions and excessively shrill horns, Dr. Mohiuddin Farooque filed another writ petition seeking implementation of the provisions of the Motor Vehicles Ordinance, 1983. The HCD recognised that a pollution free environment is a component of the right to life guaranteed under the Constitution. Hence, it ordered the government to phase out the two stroke three wheelers and replace them with cleaner alternatives by December 2003. This verdict has led to CNG auto rickshaws being fielded in our streets ever since.

SC orders government to ensure safe drinking water

In *Rabia Bhuiyan, MP* v *Ministry of LGRD & others,* the writ petition was filed regarding the failure of the government to seal tube-wells contaminated with arsenic. The court acknowledged the extreme gravity of the situation and the health hazards of consuming arsenic-contaminated water by the public. It linked environment pollution to violation of the right to life under the Constitution and the need to improve the environment to uphold this right.

SC prohibits the construction of multi-storied shopping mall in violation of Dhaka City Master Plan

In *Sharif Nurul Ambia* v *Dhaka City Corporation*, the SC ordered to stop the construction of a 10-storied shopping complex in the reserved place for public car parking in the Master Plan of greater Dhaka, despite the activities that the respondents had carried out so far. It held that the construction began without any approval of the building plan and it would be detrimental to public health by causing traffic congestion and blocking the free passage of air and light in the area.

SC orders eviction of tanneries from Hazaribagh

In 2017, the SC upheld the eviction order of 155 tanneries from Hazaribagh and fined BDT 55,000/- each for polluting the neighbourhood and the Buriganga river. Environmentalists and the government had rallied against their operation and advocated for their relocation. A follow-up report in 2019 revealed that the tanneries had moved out of Hazaribagh. RAJUK now plans to construct parks, playgrounds, community halls, shopping malls and a site for indoor games in the area.

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